

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
D.P. MARSHALL JR., JUDGE

DIVISION I

CA07-534

13 February 2008

JAMES MITCHELL,  
                                APPELLANT  
v.

AN APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT  
[CV 2006-2650]

HAROLD NETTLES,  
                                APPELLEE

THE HONORABLE TIMOTHY DAVIS  
FOX, CIRCUIT JUDGE

AFFIRMED

The circuit court dismissed this case based on no service within the time prescribed by Rule of Civil Procedure 4(i). The dismissal was with prejudice because the case had already been dismissed once for lack of prosecution. James Mitchell, the plaintiff below, appeals and argues that the circuit court erred by dismissing the case. This record reveals a mix-up about an order extending time for service. But even giving Mitchell the benefit of that mix-up, his service of Harold Nettles was still untimely. The circuit court therefore correctly dismissed Mitchell's re-filed case with prejudice.

Mitchell sued Nettles, alleging that Nettles's negligence had caused a car wreck. The circuit court dismissed Mitchell's case without prejudice and he eventually re-filed it. He

was unable to serve Nettles, and timely moved for a 120-day extension of time to do so. The circuit court granted Mitchell's motion in part: using duplicate orders supplied by Mitchell, the court crossed out the "120" days on some (but not all) of the orders, and inserted "60" days instead. The court had all the orders timely filed. It then mailed file-marked copies to counsel. The two copies that were sent to Mitchell had no hand-written change, and reflected that he had 120 extra days to serve Nettles.

For various reasons, including some significant personal problems that Mitchell's lawyer had to deal with, Mitchell did not serve Nettles until 126 days after the effective date of the extension order. Nettles moved to quash this service. He did so because—unbeknownst to Mitchell—the circuit court had already dismissed the case after the 60-day extension had expired without service being perfected.

At this point, the 60-day/120-day problem with the duplicate orders came to light. Mitchell asked the court to vacate the earlier dismissal for two reasons. First, he argued, he was entitled to rely on the file-marked order that he received from the circuit court giving him the 120-day extension. Second, he contended that his lawyer's personal and family problems constituted excusable neglect for the untimely service that justified setting aside the dismissal. The request was, in substance, a request for relief under Rule of Civil Procedure 60. The circuit court denied Mitchell's motion, quashed the service, and left the prior dismissal intact.

The circuit court did not abuse its discretion on any of these issues. *Office of Child*

*Support Enforcement v. Pyron*, 363 Ark. 521, 527, 215 S.W.3d 637, 640 (2005). The court candidly acknowledged that the 60-day/120-day mistake was an error on its part, but concluded that the error was not dispositive because Mitchell did not serve Nettles until the 126th day. We agree. If Mitchell had served Nettles before the 120-day extended period expired, then this would be a different case. Compare *King v. Carney*, 341 Ark. 955, 20 S.W.3d 341 (2000) (plaintiff had the right to rely on extension orders that were in effect on the date that she obtained service on defendants, even if the extensions were erroneously granted and were later revoked). In that situation, as the circuit court noted, it would have had wide discretion under Rule 60(a) to vacate its dismissal order. E.g., *Fritzinger v. Beene*, 80 Ark. App. 416, 420–21, 97 S.W.3d 440, 442–43 (2003). Mitchell served Nettles, however, past the 120-day deadline set by the inadvertently unamended copies of the extension order that Mitchell received.

Moreover, Mitchell’s time to get service expired even giving him the benefit of Rule 6’s extra days when the last day of any time period prescribed by the rules falls on a weekend or a holiday. *Delight Oak Flooring Co. v. Arkansas Louisiana Gas Co.*, 14 Ark. App. 24, 25, 684 S.W.2d 271, 272 (1985). His last possible day to serve Nettles was November 7th. It was undisputed, however, that Mitchell served Nettles on November 13th—six days too late. Mitchell’s argument about Veteran’s Day, which was observed on November 10th in 2006, is therefore misplaced.

Rule 4(i)’s deadline for service is mandatory. *Tobacco Superstore, Inc v. Darrough*,

362 Ark. 103, 116, 207 S.W.3d 511, 518–19 (2005). The case is not commenced unless the plaintiff meets that deadline. *Posey v. St. Bernard's Healthcare, Inc.*, 365 Ark. 154, 160–62, 226 S.W.3d 757, 762–63 (2006). The circuit court found that Mitchell's counsel was dealing with weighty personal and family issues during the window for service. As the circuit court also correctly held, however, no precedent exists for avoiding Rule 4(i)'s deadline for service based on excusable neglect. The Rule authorizes extensions of the deadline for good cause if the plaintiff moves for more time before the 120-day period expires. But it does not allow the circuit court to reopen the service period based on a motion showing excusable neglect made after the service period has closed.

Affirmed.

HART and BIRD, JJ., agree.